Washington Law Review

Volume 75 | Number 3

7-1-2000

Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence

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BEATING AGAIN AND AGAIN AND AGAIN: WHY WASHINGTON NEEDS A NEW RULE OF EVIDENCE ADMITTING PRIOR ACTS OF DOMESTIC VIOLENCE

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Abstract: Batterers in Washington who use violence to control their intimate partners routinely avoid conviction and punishment due to the difficulties of prosecuting domestic violence cases. Prosecutors often face complex problems, such as recanting victims, lack of other witnesses, and juries inherently biased against battered women. Although some Washington prosecutors have found ways to introduce evidence of prior domestic violence in certain limited circumstances, Washington Rule of Evidence 404(b) generally precludes the use of evidence showing prior domestic violence. This Comment argues that this evidence rule prevents the admission of highly probative evidence of prior abuse against current or past victims that tends to show a defendant's propensity to batter. This Comment proposes that the Supreme Court of Washington recognize the difficulty in proving domestic violence cases and adopt a new evidence rule that would admit prior acts of domestic violence for all relevant purposes—including propensity.

Since at least 1996, Roger[1] has abused his intimate partners. Ruth, Meredith, and Nicole all suffered physical abuse at the hands of Roger. His outbursts varied from beating Ruth's head against a door to destroying a phone to prevent a bruised and bleeding Nicole from calling 911. Due to Washington's current restrictions on admitting evidence of prior abuse, Roger was never convicted of his assaults against Ruth or Meredith. Finally, in December 1999, Roger received "justice"—he pleaded guilty to one count of assault against Nicole and served one day in jail.

In Washington, countless batterers[2] avoid conviction or meaningful sentencing because Washington Rule of Evidence (ER) 404(b) severely restricts admission of evidence of a defendant's prior domestic violence.[3] Past victims, like Meredith, are not allowed to testify about the defendant's violence against them even if the batterer claims that the

1. Names of all parties in the introduction have been changed to protect privacy. Court documents are on file with author.

2. A "batterer" is a person who systematically abuses in order to "coerce the victim to do the will of the victimizer." Margi Laird McCue, *Domestic Violence, A Reference Handbook* 3 (1995) (internal citation omitted). This Comment will use the term "batterer" and "abuser" interchangeably.

3. *See* Wash. R. Evid. 404(b).

current victim was injured by accident.[4] For evidence of prior abuse against the same victim, admissibility varies according to the seriousness of abuse committed and the type of defense raised.[5] Because domestic violence victims often recant their reports of abuse, evidence of past violence can be critical to the prosecution's case.[6] Even if the victim does testify at trial, studies show that without evidence of prior abuse many jurors are inherently biased against the domestic violence victim and tend to believe the violence did not occur.[7]

This Comment argues that the Supreme Court of Washington should establish a new evidence rule authorizing admission of evidence of defendants' prior acts of domestic violence. This Comment urges Washington courts to admit evidence of defendants' prior abuse against both current and past victims and to allow juries to consider these bad acts to show defendants' propensity[8] for violence against intimate partners. Part I provides an overview of domestic violence dynamics and explains the problems associated with prosecuting domestic violence cases. Part II explains the current application of ER 404(b) in Washington domestic violence cases. Part III provides examples of changes to evidentiary rules made by courts and legislatures when prior rules failed to allow admission of probative evidence. Part IV analyzes the overly restrictive nature of the current Washington law that denies admission of evidence of prior domestic violence. Finally, Part V argues that public-policy concerns, judicial consistency, and the importance of admitting highly probative evidence in criminal cases all support the adoption of a new evidence rule allowing admission of evidence of any prior domestic violence to show a defendant's propensity to batter.

4. *See infra* notes 198–202 and accompanying text.

5. *See infra* Part IV.

6. *See infra* Part I.B.1.

7. *See infra* Part I.B.2.

8. Propensity is the inclination or predisposition to commit a certain type of crime. *See* Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 388 (1996).

I. DOMESTIC VIOLENCE IN INTIMATE RELATIONSHIPS AND THE DIFFICULTIES IN CONVICTING PERPETRATORS

A. Domestic Violence Dynamics in Intimate Relationships

In order to understand the need for change in evidentiary rules, one must first comprehend the sheer magnitude of the domestic violence problem. Domestic violence is an epidemic in American society.[9] While it is difficult to determine the actual number of victims, conservative estimates reveal an alarming incidence of violence between intimate partners.[10] The real horror of domestic violence, however, lies not in the numbers, but in the way abuse occurs. Batterers develop a cyclical pattern of abuse and affection in order to control their victims.[11] This use of violence as a control mechanism is reflected in the high recidivism rate among domestic violence perpetrators.[12]

1. Domestic Violence and the Cycle of Control

Domestic violence is defined in Washington as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault[,] . . . sexual assault[,] . . . or stalking" by one family or household member against another.[13] Victims in violent intimate relationships experience a range of physical abuse from being slapped, punched, kicked, thrown, or hit with objects to being scalded with hot liquids, cut, choked, or bitten.[14] Such violent acts result in injuries ranging from bruises, concussions, or broken bones to miscarriage, partial loss of sight, and even death.[15]

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9. *See* Lisa G. Lerman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice Response* 14 (1981).

10. For purposes of this Comment, intimate partners are non-related adults who meet the definition of family or household members in Revised Code of Washington (RCW) section 10.99.020 (1998).

11. *See* Lenore E. Walker, *The Battered Woman* 55 (1979).

12. *See infra* part I.A.3.

13. Wash. Rev. Code § 26.50.010(1) (Supp. 1999). The scope of this Comment is limited to domestic violence between adult intimate partners.

14. *See* Angela Browne, *Violence in Marriage: Until Death Do Us Part*, in *Violence Between Intimate Partners: Patterns, Causes and Effects* 50 (Albert P. Cardarelli ed., 1997).

15. *See id.* at 52; *see also* Wash. Rev. Code § 10.99.020 (1998) (identifying crimes of domestic violence).

Domestic violence generally cycles through three periods: tension building, acute battering, and a honeymoon phase.[16] Minor episodes of violence may occur in the tension-building stage where individuals cope by avoiding or placating their batterers.[17] In the next phase, explosive or acute battering incidents occur, which may last from a few minutes to several days.[18] Following such battering, some couples enter a honeymoon phase where the batterer showers the victim with apologies, love, and affection,[19] while other couples proceed directly back to a tension-building stage.[20]

2. *Prevalence of Domestic Violence*

Domestic violence affects more people than any other health-care problem in the United States.[21] The Department of Justice estimates that more than 800,000 women[22] are assaulted, beaten, or raped by their intimate partners each year.[23] Conservative studies indicate that severe assaults (including kicking, biting, punching, or assaults with deadly weapons) occur in 12.6% of relationships while more "routine" violence (including slapping, shoving, or pushing) occurs in almost 28% of

16. *See* Walker, *supra* note 11, at 55.

17. *See id.* at 56–59.

18. *See id.* at 59–65.

19. *See id.* at 65–70.

20. *See* R. Emerson Dobash & Russell P. Dobash, *The Nature and Antecedents of Violent Events*, 24 Brit. J. Criminology 269, 283 (1984).

21. *See* Washington State Domestic Violence Task Force, *Final Report*, at 1 (1991) (hereinafter *Washington Final Report*) (citing former U.S. Surgeon General C. Everett Koop).

22. Although men are also victims of domestic violence, this Comment will refer to women as victims and men as batterers because women are victims in 95% of the assaults that result in injury. *See* Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* 45 (1995). Domestic violence is not restricted to heterosexual couples, but occurs in comparable rates in lesbian and gay couples. *See* Claire M. Renzetti, *Violence and Abuse among Same-Sex Couples*, in *Violence Between Intimate Partners: Patterns, Causes and Effects* 70, 70 (Albert P. Cardarelli ed., 1997). This Comment's proposal to admit evidence of past abuse in domestic violence cases would apply equally to male and female perpetrators.

23. *See* Lawrence A. Greenfeld et. al., U.S. Dep't of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 3 (1998). One source estimates that more than 2.1 million women are physically abused by their intimate partners each year. *See* Susan L. Miller & Charles F. Wellford, *Patterns and Correlates of Interpersonal Violence*, *in Violence Between Intimate Partners: Patterns, Causes and Effects* 16, 19 (Albert P. Cardarelli ed., 1997).

relationships.[24] These figures are even more troubling when considering that only one in six cases of assault are reported to law enforcement.[25]

Unfortunately, in some relationships the violence does not stop with simple assault. In 1996 alone, more than 1300 violent relationships in the United States resulted in the woman's death.[26] Of female murder victims, 30% are killed by their husbands or boyfriends.[27] Emergency-room documentation indicates that 17% of women seeking medical treatment received injuries as a result of domestic violence.[28]

3. *High Recidivism Rate of Domestic Violence*

Contrary to early theories, violence in an intimate relationship is not an impulsive action or an outbreak of rage.[29] Studies show that abusive men use violence as a control tool to force their intimate partners to comply with their demands.[30] Batterers will intentionally plan or seek out situations in which to use physical force against their partners.[31] This physical violence reinforces the batterer's ability to control his victim.[32]

Batterers seldom stop at a single violent incident.[33] Because physical violence is an instrument of control, past violent behavior in a relationship is "the best predictor of future violence."[34] Studies demonstrate that once violence occurs in a relationship, the use of force

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24. *See* Dutton, *supra* note 22, at 8 (citing studies). Some researchers believe that physical abuse occurs in 50% of all marriages at some point in the relationship. *See, e.g.*, Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 10–11 (1991).

25. *See* Dutton, *supra* note 22, at 218; *see also* Suman Kakar, *Domestic Abuse: Public Policy/Criminal Justice Approaches Towards Child, Spousal and Elderly Abuse* 38 (1998) (citing National Crime Survey that 48% of domestic violence assaults go unreported).

26. *See* Greenfeld et al., *supra* note 23, at 5.

27. *See id.*

28. *See* The Commission on Domestic Violence: Statistics (visited Jan. 5, 2000) <http://www.abanet.org/domviol/stats.html> [hereinafter *Domestic Violence Commission Web Site*] (citing Bureau of Justice Statistics: Violence-Related Injuries Treated in Hospital Emergency Departments (NCJ-156921), Aug. 1997, at 5).

29. *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. Cal. Rev. L. & Women's Stud. 71, 85 (1992).

30. *See* Jan E. Stets, *Domestic Violence and Control* 109 (1988).

31. *See* Dobash & Dobash, *supra* note 20, at 286.

32. *See id.*

33. *See* Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers, in Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* 218, 222–23 (Daniel Jay Sonkin ed., 1987).

34. *Id.* at 222.

will reoccur in 63% of these relationships.[35] Nearly one-third of domestic violence victims experiencing physical violence have been battered at least twice in the last six months.[36] Even if a batterer moves on to another relationship, he will continue to use physical force as a means of controlling his new partner.[37] Thus, without intervention by the judicial system or trained counselors, a batterer's propensity for continued violence remains high.[38]

B. Problems in Prosecuting Domestic Violence Cases

Despite the increased emphasis in law enforcement on combating domestic violence,[39] as well as increased community activism raising awareness about the problem,[40] conviction rates of batterers remain incredibly low. For every 100 domestic assaults, only 14 assaults are reported, 1.5 batterers are arrested, and 0.49 defendants are convicted.[41] The low conviction rate results from numerous problems confronting prosecutors.[42] One Washington state study found that some prosecutors are reluctant to pursue domestic violence cases because of recanting victims and the lack of meaningful punishments.[43] Even when victims cooperate fully, prosecutors routinely lack other witnesses or documented physical evidence.[44] Without corroborating evidence, domestic violence cases are difficult for the prosecution to win due to juror biases against domestic violence victims.[45]

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35. *See* Dutton, *supra* note 22, at 8–9.

36. *See* Greenfeld et al., *supra* note 23, at 15.

37. *See* Coker, *supra* note 29, at 84.

38. *See* Sonkin & Fazio, *supra* note 33, at 222–23. Twenty-five percent of men in domestic violence treatment will re-offend while in counseling. *See id.* at 223; *see also* Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide To Custody Decisions When Spouse Abuse Is Charged*, Judges J. 9, 12 (Spring 1988) (recognizing strong potential for reoccurrence of spousal abuse without counseling).

39. *See, e.g., Washington Final Report, supra* note 21, at 20.

40. *See, e.g., id.* at 9–11.

41. *See* Dutton, *supra* note 22, at 233.

42. *See* De Sanctis, *supra* note 8, at 367.

43. *See Washington Final Report, supra* note 21, at 24.

44. *See* De Sanctis, *supra* note 8, at 370–71.

45. *See infra* part I.B.2.

1. Recanting Victims

One major problem in prosecuting domestic violence is that a victim often recants her statement. Experts estimate that in Seattle, Washington, victims cooperate in only half of charged domestic violence cases.[46] When a victim refuses to help the prosecution, batterer conviction rates drop dramatically.[47] A victim will frequently express reluctance to assist the prosecution because she still loves the defendant, is financially dependent on him, or believes that he will retaliate.[48]

After reflecting on a report of physical violence, a battered woman sometimes recants based on her love of her partner. A victim normally reports physical assaults at the peak of the acute-battering stage.[49] Subsequently, however, a couple will often slip into the honeymoon stage where a batterer reconciles with the victim by showering her with gifts and promising to change.[50] A victim often will respond not only by recanting her previous report of abuse but also by working against the prosecution by cooperating with the public defender, hiring a private defense attorney, or posting bail for the batterer.[51] Even if no reconciliation occurs, a victim will sometimes choose to keep her family together rather than pursue a domestic violence assault charge.[52]

A victim will sometimes recant based on a "rational economic choice."[53] Due to his need for control, a batterer often manages all the family finances.[54] Therefore, in order to leave her abuser, a victim must walk away from her primary source of income and any family savings. If

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46. *See* Lerman, *supra* note 9, at 163 tbl.3 (citing statistics from Seattle's Battered Women's Project). Although Seattle has since stopped collecting statistics on recanting victims, Seattle prosecutors state that the incidence of recanting victims remains high. Telephone Interview with Sarah McCauley, Deputy Seattle Prosecuting Attorney (Jan. 7, 2000). *See also*, De Sanctis, *supra* note 8, at 367 (stating that victims refuse to cooperate in 80% to 90% of cases).

47. *See* Dutton, *supra* note 22, at 216; *see also* Lerman, *supra* note 9, at 18 (citing study that 92% of dismissals of felony domestic violence cases occur because of victim not cooperating).

48. *See* Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* 28–29 (1996).

49. *See* De Sanctis, *supra* note 8, at 369; *see also supra* notes 16–20 and accompanying text.

50. *See* Stuart H. Baggish & Christopher G. Frey, *Domestic Physical Abuse: A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony*, Fla. B.J. 57, 57 (Oct. 1994).

51. *See* De Sanctis, *supra* note 8, at 369–70.

52. *See Washington Final Report*, *supra* note 21, at 6–7.

53. De Sanctis, *supra* note 8, at 369.

54. *See Washington Final Report*, *supra* note 21, at 6.

a victim is employed, departing the local area to escape the violent situation safely may force a victim to give up her job and risk her children's welfare.[55] Even if a victim can avoid moving and maintain her job, a batterer can inflict additional economic harm on the victim by harassing her at work or at home until she is fired or evicted.[56] Half of battered women who choose to leave their abusive partner drop below the poverty line.[57]

A victim may also recant based on the well-founded fear that her batterer will retaliate. One study shows that 73% of battered women who seek medical help received injuries *after* leaving their abuser.[58] Two-thirds of those killed by intimate partners were separated from their batterer prior to their death.[59] Because a batterer knows where the victim's friends and relatives live[60] and shelters are routinely filled to capacity,[61] a victim often has no safe place to hide.

2. *Juror Biases*

Even if a victim is courageous enough to testify, prosecutors must still overcome juror bias. Many jurors believe domestic violence is rare in today's society.[62] This "societal denial" is pervasive because most people want to uphold the institution of marriage and prevent scrutiny of their own relationships.[63] For example, male jurors generally minimize acts of domestic violence to prevent examination of their own acts.[64] Meanwhile, female jurors, who often refuse to believe that *they* could be

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55. *See* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. Cal. Rev. L. & Women's Stud. 219, 245 (1992).

56. *See* De Sanctis, *supra* note 8, at 368–69. Between 15% and 50% of abused women report that their abusive partner interferes with their education, training, or work. *See Domestic Violence Commission Web Site*, *supra* note 28.

57. *See* De Sanctis, *supra* note 8, at 368 (citing National Clearinghouse for the Defense of Battered Women, Statistics Packet 39–40 (3d ed. Feb. 1994)).

58. *See* Kakar, *supra* note 25, at 37; *see also* De Sanctis, *supra* note 8, at 368 n.52.

59. *See Domestic Violence Commission Web Site*, *supra* note 28.

60. *See* Bowman, *supra* note 55, at 244.

61. Between July 1, 1998, and June 30, 1999, Washington domestic violence shelters served 23,555 victims and turned away 23,409 others. Telephone Interview with Susan Hannibal, Program Manager at Dep't of Soc. & Health Servs. (Apr. 27, 2000).

62. *See* Bowman, *supra* note 55, at 244.

63. Mahoney, *supra* note 24, at 14–15.

64. *See* De Sanctis, *supra* note 8, at 372.

the victim of abuse, avoid classifying the offense as an act of domestic violence.[65] Although the media increasingly portrays acts of domestic violence in television dramas or films, assaults depicted focus on life-threatening situations.[66] Thus, many jurors tend to limit their definition of domestic violence to deadly assaults as opposed to the typical offenses of threats, harassment, simple assaults, and violations of restraining orders.[67]

Jurors are also biased by their beliefs in myths concerning how batterers and victims should look and act.[68] Jurors generally expect the batterer and the victim to fit stereotypes of domestic violence participants—low-income minorities.[69] If either the victim or batterer fails to fit such categories, many jurors will discredit the prosecution's story.[70] However, even if the victim fits the stereotype, jurors will tend to label her as a perpetual victim who seeks out abuse.[71] Many jurors accept the notion that the victim is partly to blame for the battering because she is "masochistic."[72] One juror study found that 57% of men and 71% of women believe the myth that the victim would leave her abuser if she had really experienced the alleged violence.[73] Thus, most jurors are not inclined to believe the victim's story.

When confronted with conflicting testimony between the victim and the batterer, jurors are inclined to believe the batterer. First, the disposition to believe the batterer is bolstered by gender bias or the belief that women are less credible than men.[74] Studies repeatedly show that jurors find women to be less rational, less trustworthy, and more likely to exaggerate than men.[75] Jurors' gender bias is frequently reinforced at trial

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65. At least one scholar has argued that women jurors may also fear that they could be victims of domestic violence, therefore these jurors feel the need to distance themselves from the victim and believe that the victim's behavior is the cause of the violence. *See id.* at 371–72.

66. *See* Bowman, *supra* note 55, at 234.

67. *See id.*

68. *See generally* Kakar, *supra* note 25, at 33–39.

69. *See* Bowman, *supra* note 55, at 242. Studies show domestic violence is prevalent throughout society regardless of race, ethnicity, religion, or economic status. *See* Miller, *supra* note 23, at 20.

70. *See* Bowman, *supra* note 55, at 242.

71. *See id.* (internal quotations omitted).

72. Dutton, *supra* note 22, at 214 (citing study showing 34% of men and 50% of women believe battered women enjoy getting beaten).

73. *See id.*

74. *See* De Sanctis, *supra* note 8, at 373.

75. *See id.*

because batterers often appear confident, charming, and personable on the stand.[76] Thus, jurors are easily misled to conclude that such a person could not be the monster charged with domestic assault.[77] Second, jurors are influenced by their "belief in a just world" or the belief that violence is rare and that if violence does occur, it only happens when there is good cause.[78] As a result of jurors' belief that violence is uncommon, jurors are inclined to believe the batterer's testimony that the domestic violence charge is based on a mistake, an accident, or a lie.[79] Without evidence to dispel these biases, jurors are inclined to believe the batterer over the victim, thereby increasing the difficulty of convicting domestic violence perpetrators.

II. ADMISSION OF EVIDENCE OF PRIOR DOMESTIC VIOLENCE UNDER WASHINGTON RULE OF EVIDENCE 404(b)

Although Washington prosecutors have in some circumstances found ways to introduce evidence of prior domestic violence, the admission of such evidence is limited in type and purpose by Washington Rule of Evidence (ER) 404(b). The majority of cases allowing evidence of prior domestic violence against the same victim involve spousal-murder charges[80] or cases where defendants assert a defense of mistake or accident.[81] Recognizing the difficulties in proving domestic violence cases, Washington courts have recently begun allowing evidence of prior abuse to support the victim's credibility.[82] Despite increased admission of evidence pertaining to current victims, evidence of abuse against prior victims remains extremely difficult to admit under the current application of ER 404(b).[83]

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76. *See Washington Final Report*, *supra* note 21, at 5.

77. *See id.*

78. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1737 (1991). Such a belief causes people to believe that "everyone gets what they deserve and deserves what they get." *Id.*

79. *See* De Sanctis, *supra* note 8, at 371.

80. *See* State v. Powell, 126 Wash. 2d 244, 259, 893 P.2d 615, 624 (1995) (citing cases).

81. *See, e.g.*, State v. Gogolin, 45 Wash. App. 640, 646, 727 P.2d 683, 686–87 (1986). Such a defense claims that the victim sustained injuries as a result of an unintentional act by the defendant or through some unusual or unexpected mishap. *See Black's Law Dictionary* 15, 1001 (6th ed. 1990).

82. *See infra* notes 139–43 and accompanying text.

83. *See infra* Part II.C.

A. Washington Rule of Evidence 404(b)

Under current Washington law, evidence of past crimes or bad acts cannot be admitted to show a defendant's propensity to commit the crime charged.[84] The rationale behind restricting propensity evidence is that its prejudicial effect substantially outweighs its probative value.[85] Evidence has a prejudicial effect if it tends to entice jurors to decide the merits of the case on an impermissible basis,[86] while evidence has probative value if it increases the probability of the existence of a material fact in the case.[87] In general, prior bad acts have low probative value as to whether a defendant committed the crime charged because little correlation exists between a person's disposition and conduct at a particular time.[88] In contrast, the prejudicial effect of admitting prior bad acts remains high because jurors tend to accord such evidence too much weight in relation to other evidence presented at trial.[89] The prejudicial effect of prior misconduct may also cause jurors to penalize a defendant for his or her past acts instead of focusing on whether the current charge occurred.[90]

Despite these concerns, every jurisdiction in the United States, including Washington, has recognized that in some situations the probative value of prior bad acts is sufficient to warrant its admission.[91] For example, courts will admit prior bad acts under the doctrine of chances.[92] Under this theory, prior misconduct becomes sufficiently probative when used to dispute a defendant's claim of mistake or accident when the repetition of such acts can no longer be seen as coincidental.[93] Washington Rule of Evidence 404(b) appears to accept

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84. *See* Wash. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *accord Powell*, 126 Wash. 2d at 258, 893 P.2d at 624.

85. *See* Wash. R. Evid. 403.

86. *See* Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 8.23 (1996).

87. *See id.* § 8.01.

88. *See id.* § 2.18.

89. *See id.* §1.03.

90. *See id.*

91. *See* Jeffrey G. Pickett, Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413–415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 Wash. L. Rev. 883, 887 (1995).

92. *See* Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1227 (1986).

93. *See id.* at 1225–26.

the doctrine of chances by authorizing the admission of evidence of past bad acts to prove identity or absence of mistake or accident.[94] In addition, ER 404(b) permits the admission of evidence of past bad acts to show "motive, opportunity, intent, preparation, plan, [or] knowledge."[95] Although most trial courts rely on the enumerated categories in ER 404(b), courts have discretion to admit other evidence of past bad acts if the probative value outweighs the prejudice to the defendant.[96]

When determining whether ER 404(b) applies to particular evidence, a trial court applies a four-part test.[97] First, a court identifies the purpose for admitting the prior misconduct (for example to show motive or absence of accident).[98] Second, a court decides whether the evidence is relevant to prove an element of the offense charged.[99] Third, a court balances the probative value of the evidence with its prejudicial effect by applying the test articulated by Washington Rule of Evidence 403.[100] Finally, the prosecution must demonstrate by a preponderance of the evidence that the bad act occurred.[101] Once a court rules on the admissibility of prior-misconduct evidence, only the defendant may appeal the ruling.[102] On appeal, the evidentiary determination by the trial court in admitting prior misconduct is reviewed for abuse of discretion.[103]

B. *Admissibility of Evidence of Past Domestic Violence Against the Same Victim Under Current Washington Law*

While Washington courts hearing spousal-murder cases have admitted evidence of past violence since 1914,[104] the Supreme Court of Washington first fully explored the admission of prior domestic violence

94. *See* Wash. R. Evid. 404(b).

95. Wash. R. Evid. 404(b).

96. *See* State v. Lane, 125 Wash. 2d 825, 831, 889 P.2d 929, 932 (1995).

97. *See* State v. Lough, 125 Wash. 2d 847, 853, 889 P.2d 487, 490 (1995).

98. *See id.*

99. *See id.* Evidence is relevant if the "purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wash. 2d 244, 259, 893 P.2d 615, 624 (1995).

100. *See Lough*, 125 Wash. 2d at 853, 889 P.2d at 490; *see also* Wash. R. Evid. 403.

101. *See Lough*, 125 Wash. 2d at 853, 889 P.2d at 490.

102. *See* Wash. Rev. Code § 10.10.010 (1998); State v. Rear, 5 Wash. 2d 534, 537–38, 105 P.2d 827, 828 (1940).

103. *See Powell*, 126 Wash. 2d at 258, 893 P.2d at 624.

104. *See, e.g.*, State v. Lewis, 80 Wash. 532, 534–35, 141 P. 1025, 1025–26 (1914).

evidence in *State v. Powell*.[105] After enduring months of beatings, attempted strangulations, and threats, Carrie Powell left her husband.[106] Two days later, Carrie's husband strangled her, crushed her skull into fragments, and threw her body off the Deception Pass Bridge.[107] The trial court admitted evidence of prior abuse under ER 404(b) for the purposes of showing motive,[108] intent,[109] and opportunity.[110] On review, the supreme court upheld the admission of prior-misconduct evidence for showing motive and res gestae[111] but found the trial court erroneously admitted evidence under the ER 404(b) categories of intent and opportunity.[112]

The Supreme Court of Washington upheld the admission of prior assaults under ER 404(b) to demonstrate motive.[113] Specifically, the court upheld the admissibility of eyewitness testimony describing the defendant beating Carrie on prior occasions and testimony that Carrie attempted to divorce her husband but later dropped the action.[114] The court also affirmed the admission of a friend's testimony that, after seeing bruises and red marks on Carrie's neck, Carrie had acknowledged that her husband tried to strangle her.[115] The court found this evidence of prior misconduct probative to demonstrate the defendant's motive.[116] Prior to admission, however, the court required that the evidence have a specific purpose to warrant its admission.[117] The court ruled that, because

105. 126 Wash. 2d 244, 893 P.2d 615 (1995).

106. *See id.* at 247, 249–51, 893 P.2d at 618–20.

107. *See id.*

108. Motive is the "impulse, desire, or any other moving power which causes an individual to act." *Id.* at 259, 893 P.2d at 624.

109. Intent is the "[d]esign, resolve or determination with which [a] person acts." *Black's Law Dictionary*, *supra* note 81, at 810.

110. *Powell*, 126 Wash. 2d at 253, 893 P.2d at 621. Opportunity evidence "demonstrates the ability of a defendant to do a wrong because of a favorable combination of circumstances, time, and place that serves to identify the defendant." *Id.* at 262–63, 893 P.2d at 626.

111. Res gestae evidence includes the actions or occurrences so closely connected to an event that they are essentially part of the event. *See Black's Law Dictionary*, *supra* note 81, at 1305.

112. *See Powell*, 126 Wash. 2d at 264, 893 P.2d at 626–27.

113. *See id.* at 260, 893 P.2d at 625.

114. *See id.* at 249–50, 893 P.2d at 618–19.

115. *See id.* at 250–51, 893 P.2d at 619–20.

116. *See id.* at 260–61, 893 P.2d at 625.

117. *See id.* at 260, 893 P.2d at 625.

"only circumstantial proof of guilt exist[ed]" against the defendant, evidence of prior abuse was admissible to show motive.[118]

The court also affirmed the admission of prior misconduct under res gestae.[119] Although not a specific exception under ER 404(b),[120] res gestae allows admission of prior-misconduct evidence to "'complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'"[121] In *Powell*, the court affirmed the admission of evidence detailing the last two days of Carrie's life to establish the violence between Carrie and her husband prior to her death.[122] Using res gestae, the court upheld testimony that the day of Carrie's death the defendant was drinking and becoming violent, Carrie wanted to call the police, and the defendant expressed outrage when he discovered Carrie had taken money from their joint bank account.[123]

The Supreme Court of Washington, however, overruled the trial court's decision to allow evidence of prior bad acts to show intent and opportunity under ER 404(b).[124] Although the evidence of prior misconduct was probative of the defendant's intent, the court required that such evidence be necessary to prove a material issue.[125] The court found that proof of manual strangulation established intent to kill, and thus evidence of prior beatings was inadmissible to show intent.[126] In addition, the court held that none of the evidence of prior bad acts established the defendant's opportunity to murder Carrie.[127] Opportunity evidence is admissible only if the time, place, and circumstances surrounding the act demonstrate the defendant's ability to have accomplished the alleged act.[128] The trial court's erroneous admission of evidence under the ER 404(b) exceptions of intent and opportunity did not require reversal of the defendant's conviction because the court

118. *See id.*

119. *See id.* 263, 893 P.2d at 626.

120. *See supra* notes 94–95 and accompanying text.

121. *Powell*, 126 Wash. 2d at 263, 893 P.2d at 626 (quoting State v. Tharp, 27 Wash. App. 198, 204, 616 P.2d 693, 697 (1980)).

122. *See id.*

123. *See id.* at 250, 893 P.2d at 619.

124. *See id.* at 261–63, 893 P.2d at 625–26.

125. *See id.* at 262, 893 P.2d at 626.

126. *See id.*

127. *See id.* at 262–63, 893 P.2d at 626.

128. *See id.*

upheld the admission of prior-misconduct evidence to show motive and res gestae.[129]

Since *Powell*, other Washington courts have admitted evidence of prior abuse against the same victim using ER 404(b) criteria such as motive, res gestae, and absence of accident. The Supreme Court of Washington upheld the admission of evidence of prior quarrels to demonstrate motive in *State v. Stenson*.[130] This evidence included testimony that the defendant allowed his wife to leave the house only once a day and that the defendant displayed controlling and antagonistic behavior during a quarrel with his wife.[131] Washington courts have also allowed evidence of prior verbal abuse and threats in order to demonstrate res gestae in domestic violence cases of felony harassment[132] and rape.[133] Finally, Washington courts have admitted evidence of past domestic assaults when the defendant raises an accident defense.[134] In *State v. Gogolin*,[135] the court upheld the admission of evidence showing a history of abuse and hostility in the defendant's conduct toward his ex-wife in order to rebut the defendant's claim that his ex-wife received her head wounds from falling down stairs.[136]

Some Washington appellate courts have also gone beyond the exceptions listed in ER 404(b) and admitted evidence of past abuse to support a domestic violence victim's credibility. A victim's testimony in court may directly contradict her prior actions or statements because a domestic violence victim often complies with her batterer's demands in order to prevent violence and thus minimizes her description of physical abuse.[137] In *State v. Grant*,[138] the court allowed evidence of prior assaults by the defendant to explain why his wife talked with him despite a no-contact order and why she initially refused to identify the defendant as

129. *See id.* 264, 893 P.2d at 626.

130. 132 Wash. 2d 668, 702–03, 940 P.2d 1239, 1257 (1997).

131. *See id.* at 698–701, 940 P.2d at 1255–56.

132. *See, e.g.*, State v. Pressnell, No. 20092-9-II, 1997 WL 273632, at *1–3 (Wash. Ct. App. May 23, 1997).

133. *See, e.g.*, State v. Mills, No. 41992-7-I, 1999 WL 294102, at *1–2 (Wash. Ct. App. May 10, 1999), *review denied*, 139 Wash. 2d 1009, 994 P.2d 846.

134. *See, e.g.*, State v. Gogolin, 45 Wash. App. 640, 646, 727 P.2d 683, 687 (1986).

135. *Id.*

136. *See id.* at 646, 727 P.2d at 686–87.

137. *See* State v. Grant, 83 Wash. App. 98, 107, 920 P.2d 609, 613 (1996).

138. 83 Wash. App. 98, 920 P.2d 609 (1996).

her attacker.[139] The court reasoned that evidence of prior domestic violence helps explain the victim's prior inconsistent statements and conduct that the jury might otherwise weigh against her credibility.[140] Appellate courts have also allowed evidence of past assaults when, at trial, the victim disclaims any physical abuse by the defendant.[141] In *State v. Woods*,[142] the court upheld admission of a 911 call by the victim, after a previous assault by the defendant, in order to show the credibility of the recanting victim.[143]

C. *Admissibility of Evidence of Past Domestic Violence Against a Prior Victim Under Current Washington Law*

Although Washington appellate courts have become more liberal in upholding the admission of prior abuse evidence involving the same victim, courts rarely admit evidence of prior bad acts against other victims. Washington courts normally admit evidence of crimes against other victims only when it demonstrates a common scheme.[144] A common scheme consists of a plan repeatedly used by the defendant to commit separate but very similar crimes.[145] The Supreme Court of Washington held in *State v. Lough*[146] that common-scheme evidence is admissible under ER 404(b) only when the defendant's prior bad acts bear significant similarity to the defendant's alleged actions in the charged crime such that the "similarity is not merely coincidental, but indicates that the conduct was directed by design."[147] In *Lough*, the court

139. *See id.* at 101, 106–07, 920 P.2d at 610–11, 613–14.

140. *See id.* at 106–07, 920 P.2d at 613–14; *see also* State v. Wilson, 60 Wash. App. 887, 890–91, 808 P.2d 754, 756–57 (1991); State v. Norby, No. 37543-1-I, 1997 WL 79484, at *1 (Wash. Ct. App. Feb. 24, 1997) (allowing evidence of prior violence and abuse to demonstrate reasonableness of victim's fear as element of felony harassment).

141. *See, e.g.*, State v. Bernal, No. 41022-9-I, 1999 WL 10094, at *1, *4 (Wash. Ct. App. Jan. 11, 1997).

142. No. 42197-2-I, 1999 WL 307246 (Wash. Ct. App. May 17, 1999).

143. *See id.* at *3.

144. *See, e.g.*, State v. Lough, 125 Wash. 2d 847, 855, 889 P.2d 487, 491 (1995). *But see* State v. Brown, 132 Wash. 2d 529, 573–75, 940 P.2d 546, 570–71 (1997) (allowing evidence of attempted murder, false imprisonment, torture, and rape of another victim when defendant murdered victim in same manner for purposes of demonstrating premeditation, intent, and res gestae).

145. *See Lough*, 125 Wash. 2d 847, 855, 889 P.2d 487, 491 (1995). Common-scheme evidence is also permitted to show several crimes committed to achieve a larger plan. *See id.*

146. 125 Wash. 2d 847, 889 P.2d 487 (1995).

147. *Id.* at 860, 889 P.2d at 494.

allowed testimony from four other victims that the defendant, a paramedic, drugged their drinks with a particular chemical and then anally raped them.[148] Domestic violence fact patterns rarely, if ever, meet the similarity requirements necessary for admission under ER 404(b)'s common-scheme or plan exception because the type of abuse and surrounding circumstances vary considerably.[149] As a result, ER 404(b) routinely restricts the admission of probative evidence of past domestic violence against other victims.

III. COURTS AND LEGISLATURES HAVE MODIFIED EVIDENTIARY RULES WHEN PROBATIVE EVIDENCE IS INADMISSIBLE UNDER PRIOR LAW

Outside of domestic violence cases, both Washington courts and the state legislature have established specific evidentiary exceptions when confronted with evidence that possesses the requisite probative value for admissibility but is nonetheless excluded by current evidence rules. The courts and legislature establish evidentiary exceptions most often for crimes bearing unique characteristics, such as lack of witnesses or high recidivism rates. For example, Washington courts have recognized a non-enumerated ER 404(b) category to allow evidence of lustful disposition in sexual assault cases,[150] and the Washington Legislature has enacted a special hearsay exception for child abuse cases.[151] Within the domestic violence context, other jurisdictions have recognized prior acts of domestic violence as a category needing distinct treatment and therefore have established a separate evidence rule authorizing its admission.[152]

148. *See id.* at 850–51, 889 P.2d at 489; *see also* State v. Roth, 75 Wash. App. 808, 822, 881 P.2d 268, 277 (1994) (allowing evidence of prior wife's allegedly accidental death while hiking to demonstrate common scheme in spousal-murder and life-insurance fraud case after defendant's fourth wife drowned while rafting).

149. *See infra* notes 198–202 and accompanying text.

150. Evidence of lustful disposition includes any prior misconduct by the defendant demonstrating a lustful inclination or sexual desire toward the victim. *See* State v. Ferguson, 100 Wash. 2d 131, 133–34, 667 P.2d 68, 71 (1983).

151. *See* Wash. Rev. Code § 9A.44.120 (1998).

152. *See infra* Part III.C.

A. *Washington Courts Have Expanded ER 404(b) to Allow Prior Misconduct in Sexual Assault Cases*

Washington courts have established a non-enumerated exception to ER 404(b) for "lustful disposition" evidence in sexual assault cases because such evidence categorically bears sufficient reliability and probative value to outweigh any unfair prejudice to a defendant.[153] Washington courts use this exception to admit evidence of past sexual misconduct to show a defendant's lustful inclination or sexual desire toward the victim.[154] For example, in *State v. Ray*,[155] the court held that testimony by the defendant's daughter about three prior sexual contacts was admissible in the current incest charge to show the father's sexual desire toward his daughter.[156] Unlike the admission of prior acts of domestic violence, lustful-disposition evidence is allowed for propensity to show that the charged offense is more probable because the defendant displayed a past lustful inclination toward the victim.[157]

Washington's lustful-disposition exception is essentially a narrower version of Federal Rule of Evidence 413,[158] which governs the admissibility of prior bad acts in sexual assault cases.[159] Like Washington's lustful-disposition exception, the federal rule allows evidence of a defendant's prior sexual offenses against the same victim to be used by a jury for "any matter to which it is relevant" including to prove the defendant's propensity to commit the crime.[160] Federal Rule of Evidence 413 also allows lustful-disposition evidence related to other victims.[161] Propensity evidence is important in sexual assault cases because sexual abusers are often repeat offenders and because prior-misconduct evidence helps jurors evaluate conflicting statements from a

153. The lustful-disposition exception is the "most commonly cited non-enumerated category." Robert H. Aronson, *The Law of Evidence in Washington* 404–25 (3d ed. 1998).

154. *See Ferguson*, 100 Wash. 2d at 133–34, 667 P.2d at 71; *see also* State v. Thorne, 43 Wash. 2d 47, 60–61, 260 P.2d 331, 338–39 (1953).

155. 116 Wash. 2d 531, 806 P.2d 1220 (1991).

156. *See id.* at 546–47, 806 P.2d at 1229–30.

157. *See Ferguson*, 100 Wash. 2d at 134, 667 P.2d at 71; *see also Thorne*, 43 Wash. 2d at 61, 260 P.2d at 339.

158. Fed. R. Evid. 413.

159. *See* Pickett, *supra* note 91, at 888–90.

160. Fed. R. Evid. 413.

161. Fed. R. Evid. 413.

victim and defendant.[162] Domestic violence crimes also possess these distinctive characteristics because domestic violence has a high recidivism rate[163] and jurors routinely face inconsistencies between the victim's and defendant's testimonies.[164]

B. The Washington Legislature Changed the Evidence Rules to Allow Hearsay in Child Abuse Cases

The Washington Legislature also has modified evidence law to allow admission of probative evidence in child abuse cases. Through the passage of Revised Code of Washington (RCW) section 9A.44.120, the legislature declared that certain statements by children concerning sexual or physical abuse should be admissible at trial.[165] As in domestic violence cases, child abuse cases often have little corroborating evidence of the crime other than the victim's statements.[166] Prior to enactment of the child hearsay rule, Washington courts had "strained [the] interpretation of the excited utterance exception"[167] by admitting children's statements made as long as twenty hours after the stressful event.[168] Thus, the passage of this hearsay exception was vital to preventing further distortion of the excited-utterance hearsay exception and establishing guidelines by which courts could admit abused children's probative statements.[169]

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162. *See* 140 Cong. Rec. 23, 602–03 (1994) (statement of Rep. Molinari).

163. *See supra* part I.A.3.

164. *See supra* notes 74–79 and accompanying text.

165. Wash. Rev. Code § 9A.44.120 (1998); SSB 4461, 47th Leg., Reg. Sess. (Wash. 1982) (describing rationale for adoption of child-hearsay statute).

166. *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chi.-Kent L. Rev. 15, 20–21 (1994).

167. State v. Ramirez, 46 Wash. App. 223, 230, 730 P.2d 98, 102 (1986) (citing State v. Woodward, 32 Wash. App. 204, 206–07, 646 P.2d 135, 137 (1982)). Excited utterances are admissible if a declarant makes a statement about a startling event while still under the "stress of excitement." Wash. R. Evid. 803(a)(2).

168. *See Ramirez*, 46 Wash. App. at 230, 730 P.2d at 102.

169. *See id.* at 230–31, 730 P.2d at 102; Sheryl K. Peterson, Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 Wash. L. Rev. 813, 817–18 (1983).

C. *Other Jurisdictions Have Changed Evidence Rules to Admit Evidence of Prior Domestic Violence*

Some states have enacted specific rules of to allow the admission of prior domestic violence evidence based on the probative nature of such evidence. Acknowledging the cyclical nature of domestic violence and its high recidivism rate, both Colorado and Minnesota authorize admission of evidence of past domestic abuse between the victim and defendant.[170] The California legislature has gone even further by enacting California Evidence Code section 1109, which authorizes the admission of evidence of prior domestic violence against the same or other victims to show propensity.[171] In passing section 1109, the California legislature found that the probative value of past domestic violence outweighed the rationale normally forbidding propensity evidence[172] and thereby established a presumption that evidence of prior domestic abuse is probative in domestic violence cases.[173] This presumption is balanced with two safeguards: the judge's discretion to refuse admission if the prejudicial effect outweighs the probative value of the evidence and a ten-year time limit on the admissibility of prior bad acts.[174]

Since the passage of section 1109, California courts have permitted juries to infer that the defendant had the disposition to commit domestic violence based on past incidents of battery. In *People v. Hoover*,[175] the California Court of Appeal held that evidence of prior beatings was admissible for the purpose of showing propensity and that such an admission did not violate the defendant's due process rights.[176] In addition to allowing evidence for purposes of propensity, section 1109 allows other victims to testify to the defendant's prior domestic assaults on them.[177] In *People v. Poplar*,[178] the California Court of Appeal upheld the testimony of two of the defendant's prior girlfriends describing his

170. *See* Colo. Rev. Stat. Ann. § 18-6-801.5 (West 1999); Minn. Stat. Ann. § 634.20 (West Supp. 2000).

171. *See* Cal. Evid. Code § 1109 (West Supp. 2000).

172. *See* S.B. 1876, 1995 Leg., Reg. Sess. (Cal. June 28, 1996)

173. *See* Cal. Evid. Code § 1109.

174. *See* Cal. Evid. Code § 1109.

175. 92 Cal. Rptr. 2d 208 (Cal. Ct. App. 2000).

176. *See id.* 210–11 (upholding admission of prior bad acts to show propensity under section 1109 where defendant choked and threatened to kill victim).

177. *See* Cal. Evid. Code § 1109(a).

178. 83 Cal. Rptr. 2d 320 (Cal. Ct. App. 1999).

physical assaults on them to demonstrate the defendant's disposition of violence toward his domestic partners.[179] Unlike Washington courts, the California court admitted evidence of domestic violence from prior victims under a specific domestic violence evidence rule and did not require proof of a common scheme or plan.[180]

IV. WASHINGTON LAW UNDULY RESTRICTS ADMISSION OF EVIDENCE OF PRIOR DOMESTIC VIOLENCE

In numerous types of cases, ER 404(b) forbids admission of probative evidence of prior domestic violence. Because prosecutors cannot appeal a trial court's ruling denying admission of evidence of prior domestic violence,[181] appellate decisions upholding the admission of evidence of prior domestic violence do not sufficiently represent ER 404(b)'s inadequacies. Four problems exist with the current admissibility standards of ER 404(b): (1) admission of evidence depends on the victim's type of injury, (2) the prosecution can rarely enter prior bad acts during its case in chief, (3) admission of evidence depends on the defense presented, and (4) evidence of prior domestic violence against past victims is inadmissible.

First, ER 404(b)'s admissibility standards for evidence of prior domestic violence vary depending on the victim's type of injury. Washington Rule of Evidence 404(b) restricts prior-misconduct evidence for purposes of showing intent more often in cases of brutal, rather than less heinous, domestic violence crimes because evidence of past bad acts is inadmissible to show intent if the act is so violent that intent is clear.[182] Thus, as in *State v. Powell*, where the defendant strangled the victim and bashed her skull into pieces,[183] the more physically violent the assault, the less probative the evidence becomes for purposes of intent. A similar restriction on admissibility of prior bad acts occurs in general-intent crimes.[184] Because general-intent crimes do not require the prosecution to prove that the defendant intended the exact harm or result that

179. *See id.* at 326.

180. *See id.* at 324–25.

181. *See supra* note 102 and accompanying text.

182. *See* State v. Powell, 126 Wash. 2d 244, 262, 893 P.2d 615, 626 (1995); De Sanctis, *supra* note 8, at 376–77.

183. *See Powell*, 126 Wash. 2d at 247, 893 P.2d at 618.

184. "General intent" is the intent to violate the law. *See Black's Law Dictionary*, *supra* note 81, at 810.

occurred,[185] evidence of prior misconduct is not admissible under ER 404(b) to show intent.[186] With the majority of domestic violence charges being simple-assault or general-intent misdemeanors,[187] this eliminates the ability to admit prior bad acts under ER 404(b) to show intent in most domestic violence cases,[188] even though such cases often lack witnesses or documented evidence.[189]

Second, ER 404(b) inhibits the ability of prosecutors to admit prior bad acts in their case in chief. Prosecutors prefer to introduce prior bad acts in their opening statements to facilitate the jury's comprehension of the state's theory.[190] In domestic violence cases, however, ER 404(b) provides only a few exceptions, such as motive and intent, that allow the prosecutor to admit evidence regardless of the type of defense presented.[191] If a prosecutor is unable to meet the requirements of ER 404(b), the court will not admit evidence of prior bad acts in the prosecutor's case in chief because the only remaining purpose of such evidence would be to show propensity, not currently permitted under ER 404(b) except for lustful disposition.[192]

Third, the prosecutor's ability to admit evidence of prior domestic abuse under ER 404(b) is constrained by the type of defense presented. If a defendant claims that the injury was an accident or resulted from self-defense, the prosecution must prove enough similarity between the charged offense and the prior misconduct such that the similarity shows the victim's injuries resulted from an intentional act.[193] In contrast, if the defendant denies that he was the perpetrator, the prosecution must meet the much higher admissibility standard of identity under ER 404(b) prior to admission of prior acts of domestic violence. Washington courts

185. *See id.*

186. *See Powell*, 126 Wash. 2d at 262, 893 P.2d at 626 (requiring prior-misconduct evidence be necessary to prove element of charge in order to admit such evidence).

187. *See* De Sanctis, *supra* note 8, at 396. In Washington, simple assault or assault in the fourth degree requires no showing of intent. *See* Wash. Rev. Code § 9A.36.041 (1998).

188. *See* De Sanctis, *supra* note 8, at 396.

189. *See supra* note 44 and accompanying text.

190. *See* Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. Cal. L. Rev. 1463, 1494 (1996).

191. *See id.* at 1495; interview with Cathy Shaffer, Senior Deputy King County Prosecuting Attorney, in Seattle, Wash. (Nov. 5, 1999) (stating that prior bad-act evidence is rarely allowed in prosecutor's case in chief).

192. *See* Wash. R. Evid. 404(b); State v. Powell, 126 Wash. 2d 244, 258, 893 P.2d 615, 624 (1995).

193. *See* State v. Gogolin, 45 Wash. App. 640, 646, 727 P.2d 683, 686–87 (1986).

require identity evidence to be "so unusual and distinctive as to be like a signature."[194] Because domestic violence can range from the killing of a favorite pet to shoving a victim into a wall,[195] evidence of past domestic violence is unlikely to meet the admissibility standards for identity evidence. Alternatively, in a case lacking physical evidence and relying on the victim's testimony, the defendant could deny that the beating actually took place.[196] By not raising a defense of accident or identity, the defense could restrict the prosecution from admitting any evidence of prior domestic violence because the sole purpose of admitting such evidence would be to prove propensity, which is currently disallowed under ER 404(b).[197]

Fourth, prior acts of domestic violence against other victims rarely, if ever, meet ER 404(b)'s standard for common scheme or plan because courts limit common-scheme evidence to testimony demonstrating an overarching plan or scheme based on "unusual and abnormal elements" or a "repetition of complex common features."[198] Despite being victim to the same abuse and control tactics by the defendant, domestic violence victims' experiences often differ in both the type of offense (for example verbal harassment versus physical attack) and triggering event (for example ending the relationship versus talking with a male coworker).[199] Even though this evidence seldom meets the common-scheme or plan admissibility requirements,[200] prior-victim evidence is often necessary to convict a batterer. Unlike current victims, past victims may be more willing to testify because they are no longer subject to the domestic violence cycle.[201] Furthermore, an additional victim may force jurors to

194. State v. Coe, 101 Wash. 2d 772, 777, 684 P.2d 668, 672 (1984).

195. *See* De Sanctis, *supra* note 8, at 395.

196. Interview with Kristin Chandler & Jim Ferrell, Deputy King County Prosecuting Attorneys, in Seattle, Wash. (Dec. 13, 1999) (describing ways defendants can get around ER 404(b)).

197. *See Powell*, 126 Wash. 2d at 258, 893 P.2d at 624; *see also* Carson v. Fine, 123 Wash. 2d 206, 221, 867 P.2d 610, 619 (1994).

198. State v. Burkins, 94 Wash. App. 677, 689, 973 P.2d 15, 23 (1999); *see also supra* Part II.C.

199. *See* DeSanctis, *supra* note 8, at 395–96.

200. The fact that no Washington appellate court has ruled on the admissibility of other victims' testimony in a domestic violence case strongly suggests that no lower court has ever admitted such testimony. Telephone interview with Jim Senescu, Deputy Clark County Prosecuting Attorney (Dec. 23, 1999) (stating that judges have never admitted such evidence in his cases); *see also* De Sanctis, *supra* note 8, at 395–96.

201. *See* De Sanctis, *supra* note 8, at 397.

reevaluate their biases and to give proper weight to the current victim's testimony.[202]

In domestic violence cases, ER 404(b) overly restricts the admission of evidence of prior abuse. The admissibility standard for evidence of prior domestic violence varies dramatically depending on the type of injury received, who received the abuse, and the type of defense presented. A new rule authorizing the admission of evidence of prior domestic violence is needed to correct these variances and enable the jury to consider probative evidence of a defendant's prior abusive behavior.

V. WASHINGTON SHOULD ADOPT A RULE AUTHORIZING THE ADMISSION OF PRIOR DOMESTIC VIOLENCE EVIDENCE

The Supreme Court of Washington should adopt a rule of evidence, distinct from ER 404(b), specifically authorizing admission of evidence of prior domestic violence by a defendant against the same victim or other intimate partners. This evidence rule should apply in prosecutions of any domestic violence offense as defined in RCW section 10.99.020. Admissible evidence of prior misconduct should include any act between intimate adult partners meeting Washington's definition of domestic violence in RCW section 26.50.010(1).[203] As with ER 404(b) evidence, the prosecution first should be required to prove by a preponderance of the evidence that the prior acts of domestic violence occurred.[204] This rule should not restrict a jury's consideration of the evidence to those enumerated categories in ER 404(b) but instead should enable a jury to consider such evidence for any relevant purpose including propensity.

This proposed rule also should include safeguards to ensure a fair trial for the defendant and to guard against the historical concerns of admitting past misconduct.[205] First, this new evidence rule for domestic violence should maintain a judge's ability to limit or exclude evidence if its unfair prejudice substantially outweighs its probative value in accordance with ER 403.[206] Second, the prosecution should be required

202. *See supra* Part I.B.2.

203. *See supra* note 13 and accompanying text.

204. *See* State v. Lough, 125 Wash. 2d 847, 853, 889 P.2d 487, 490 (1995).

205. *See supra* notes 85–90 and accompanying text.

206. *See supra* note 100 and accompanying text.

to disclose to a defendant with adequate notice prior to trial both the intended use of such evidence and any witness statements or physical evidence concerning the prior bad act.[207] Finally, to ensure the probative nature of the prior bad acts, admission of evidence should be limited to those acts occurring within a specific time period, such as ten years.

Washington should follow California's lead and adopt a rule governing the admissibility of prior domestic violence evidence for three reasons. First, the repetitive nature of these crimes combined with the need to counteract jurors' traditional biases against battered victims justifies a specific evidentiary rule. Second, specific authorization of this evidence is essential to maintaining judicial consistency in domestic violence cases. Finally, a rule specifically allowing the admission of prior domestic violence will help deter future acts of violence between intimate partners.

A. Prior Acts of Domestic Violence Are Sufficiently Probative to Warrant a Separate Evidentiary Rule

The highly probative nature of evidence of prior domestic violence warrants specific authorization for its admission. In enacting Federal Rules of Evidence 413 and 414 for sexual assault and child molestation, Congress reasoned that a change in the evidence rules was necessitated by the distinctive characteristics of those types of cases—namely, the difficult credibility determinations in such cases and the disposition of defendants to repeat certain crimes.[208] Even critics of these Federal Rules have recognized the value of permitting other victims to corroborate a victim's version of a crime, of limiting jurors' tendency to blame victims, and of encouraging the reporting of such crimes.[209] The policy arguments that persuaded Congress to alter the Federal Rules of Evidence regarding prior acts of sexual assault and child-molestation offenses apply equally to domestic violence cases. First, the high recidivism rate among batterers[210] makes prior acts of domestic violence probative of a defendant's propensity to have committed the current

207. *See* Raeder, *supra* note 190, at 1493.

208. *See supra* note 162 and accompanying text.

209. *See* United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) (citing Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 Am. Crim. L. Rev. 57, 69–70 (1995)).

210. *See supra* Part I.A.3.

charged offense. Second, jurors need evidence showing prior acts of misconduct to evaluate properly a victim's credibility and to eliminate any biases about domestic violence.

1. Evidence of Prior Domestic Violence Is Probative in Showing a Batterer's Propensity to Have Committed the Charged Crime

Jurors should be permitted to consider prior acts of domestic violence for propensity purposes.[211] Although prior bad acts are usually not admissible to show propensity because of the prejudicial nature of the evidence, Washington courts have admitted propensity evidence in sexual offense crimes,[212] which bear many similarities to domestic violence.[213] Specifically, courts have allowed evidence of a defendant's prior lustful disposition toward the same victim for the purpose of showing that the charged offense more probably occurred.[214] By adopting the lustful-disposition exception, Washington courts have recognized that, in sexual offense cases, certain evidence should be admissible to show propensity because its probative value sufficiently outweighs its prejudicial effect.[215]

Like lustful-disposition evidence, prior acts of domestic violence are sufficiently probative to outweigh the prejudicial effect of such evidence. Evidence of prior domestic violence is more probative for showing that a defendant committed the crime than lustful-disposition evidence because the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders. The American Medical Association found that 47% of batterers who beat their intimate partners do so at least three times a year,[216] while the recidivism rate for sexual offenders is only 7.7% within three years.[217] Past domestic violence evidence is also relevant in helping a jury understand that domestic violence is a tool used by batterers to control their victims and not an impulsive act.[218] If a defendant has used violence as a means to control his victim, these prior

211. *See* De Sanctis, *supra* note 8, at 388–90.

212. *See* Aronson, *supra* note 153, at 404-25.

213. *See supra* notes 162–64 and accompanying text.

214. State v. Ferguson, 100 Wash. 2d 131, 134, 667 P.2d 68, 71 (1983).

215. *See* Aronson, *supra* note 153, at 404-25.

216. *See Domestic Violence Commission Web Site*, *supra* note 28.

217. *See* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529, 572 (1994).

218. *See supra* Part I.A.3.

acts demonstrate a propensity to batter, thereby making it more probable that the charged abuse occurred.

2. *Evidence of Prior Domestic Violence Is Necessary to Help Jurors Properly Evaluate Victim Credibility and to Eliminate Juror Bias*

Allowing evidence of prior bad acts will help alleviate the difficult credibility problems in domestic violence cases. Like victims of sexual assault and child molestation, domestic violence victims are normally the only witnesses to the crime, thereby making the victim's credibility central to a prosecutor's case.[219] With domestic violence crimes, however, a victim is often unwilling to testify for the prosecution and often recants her prior statements about physical abuse.[220] A new evidence rule would help the jury understand a victim's behavior if she recants due to emotional, economic, or physical perils.[221]

If the victim does testify for the prosecution, admission of prior acts will help dislodge juror biases against battered women.[222] Without corroborating evidence of prior abuse, most jurors are skewed against believing a victim's testimony based on their beliefs that violence is rare and their acceptance of common domestic violence myths.[223] Contrary to critics' arguments that evidence of prior bad acts will improperly sway the jury,[224] the admission of prior abuse will simply help dispel inherent juror biases and help jurors view evidence from an unbiased perspective.

The doctrine of chances[225] also supports the establishment of a separate domestic violence exception to assist jurors in their evaluation of victims' and defendants' testimonies. Currently, a jury is not allowed to hear evidence of prior beatings by the same defendant against a different intimate victim.[226] If faced with a victim claiming abuse and a defendant claiming that he has been falsely accused or that an accident

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219. *See* Baggish, *supra* note 50, at 58.

220. *See supra* Part I.B.1.

221. *See supra* Part I.B.1.

222. *See supra* Part I.B.2.

223. *See supra* Part I.B.2.

224. *See* Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going To Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loy. U. Chi. L.J. 1, 11–12 (1996).

225. *See supra* notes 92–94 and accompanying text.

226. *See supra* notes 198–202 and accompanying text.

caused the injury, many jurors are biased toward believing the batterer.[227] Under the doctrine of chances, once the repetition of abuse against the same or similar victims can no longer be viewed as coincidental, jurors can use such evidence to refute a defense of accident or mistake.[228] Thus, evidence of prior bad acts is relevant to the jury's evaluation of conflicting testimony based on this anti-coincidence or doctrine-of-chances argument.[229]

B. A New Domestic Violence Evidence Rule Will Help Maintain Judicial Integrity and Economy

Three judicial policy concerns highlight a need for the court to adopt a new rule specifically authorizing the admission of evidence of prior domestic violence. First, with more attention being focused on reforming the justice system's approach to domestic violence,[230] some courts have searched for new ways to admit prior acts of domestic violence.[231] In the quest to reform the judiciary's approach to domestic violence, the courts risk stretching current definitions of ER 404(b) to the detriment of defendants in non-domestic violence cases where the policy concerns may not be the same. Second, an express evidence rule that recognizes the probative nature of prior domestic violence would use judicial resources more efficiently than the current system. Finally, without an express provision allowing evidence of prior domestic violence, the potential exists for inconsistent decisions both at the trial- and appellate-court levels.

1. A New Domestic Violence Evidence Rule Will Avoid Distortion of Current ER 404(b) Definitions

A new rule permitting admission of evidence of prior domestic violence will prevent Washington courts from further distorting the current categorical exceptions of ER 404(b). Public policy pressure on the judicial system to respond to domestic violence offenses[232] has

227. *See supra* Part I.B.2.

228. *See* Lansverk, *supra* note 92, at 1227.

229. *See* De Sanctis, *supra* note 8, at 390–91.

230. *See, e.g., Washington Final Report, supra* note 21, at i.

231. *See supra* notes 139–43 and accompanying text.

232. *See Washington Final Report, supra* note 21, at 17.

prompted courts to search for ways to admit prior acts of domestic violence. This has led courts to stretch current ER 404(b) exceptions, thereby warping the definitions of these exceptions for other crimes.[233] When similar pressure was exerted on the excited-utterance hearsay exception in the context of child abuse cases, the legislature carved out a separate evidence rule to admit reliable child hearsay and ensure the integrity of the remaining evidentiary rules.[234]

Washington courts' distortion of the current law to admit evidence of prior domestic violence is demonstrated in two areas. First, definition distortion has already occurred in domestic violence cases with the use of the res gestae exception. In *State v. Powell*, the Supreme Court of Washington confined evidence admitted under res gestae to happenings within the immediate time or place of the charged offense,[235] but lower courts have since extended this exception to include evidence of prior domestic violence within six months of the crime.[236] Second, the court of appeals has created a non-enumerated ER 404(b) exception for admitting evidence of prior domestic violence. In *State v. Grant*, the court of appeals established an exception to admit evidence of prior misconduct for the purpose of assessing the victim's credibility.[237] Since *Grant*, this exception has been extended to permit such evidence even when the defendant does not raise the issue of the victim's credibility[238] or when the victim testifies that the charged incidents did not occur.[239] Because the application of ER 404(b) is not limited to domestic violence cases,[240] these generic exceptions may allow prosecutors to admit evidence of prior misconduct any time a victim's credibility needs bolstering. A separate rule allowing evidence of prior domestic violence would accomplish the goal of admitting probative domestic violence evidence

233. *Cf.* Karp, *supra* note 166, at 35 (describing stretching of Fed. R. Evid. 404(b) prior to enactment of Fed. R. Evid. 413–415).

234. *See* Part III.B.

235. State v. Powell, 126 Wash. 2d 244, 263, 893 P.2d 615, 626 (1995) (restricting res gestae evidence to two days).

236. *See, e.g.*, State v. Mills, No. 41992-7-I, 1999 WL 294102, at *1–*2 (Wash. Ct. App. May 10, 1999) (upholding admission of res gestae events occurring within last six months of relationship), *review denied*, 139 Wash. 2d 1009, 994 P.2d 846.

237. *See id.* at 106, 920 P.2d at 613.

238. *See* State v. Bernal, No. 41022-9-I, 1999 WL 10094, at *1, *4 (Wash. Ct. App. Jan. 11, 1999).

239. *See* State v. Woods, No. 42197-2-I, 1999 WL 307246, at *3 (Wash. Ct. App. May 17, 1999).

240. *See* Wash. R. Evid. 404(b).

without warping the existing ER 404(b) exceptions or establishing generic exceptions that will impact admissibility of prior bad acts outside the domestic violence context.

2. *A New Domestic Violence Evidence Rule Will Increase Judicial Efficiency*

By acknowledging the probative value and relevance of evidence showing prior domestic abuse, courts will also increase their efficiency.[241] A clear exception, recognizing the probative value of prior domestic violence, will eliminate two of the four steps currently necessary for a judge to evaluate the admission of prior bad acts. Specifically, the trial court will no longer need to identify the purpose of the evidence nor determine whether the evidence is relevant to the charged offense.[242] This will increase the efficiency of motions in limine and enable judges to concentrate solely on whether the evidence meets the requirements of ER 403 and is proven by a preponderance of the evidence.[243] In addition, as opposed to the current practice of allowing prior assaults into evidence only as rebuttal testimony, a domestic violence exception will enable a prosecutor to weave this evidence into its case in chief thereby creating a coherent theme for the jury to follow.[244]

3. *A New Domestic Violence Evidence Rule Will Prevent Inconsistent Decisions*

A specific domestic violence exception would help limit inconsistent results in the admission of prior bad acts evidence at the trial court level. According to Washington state prosecutors, trial courts vary in their approaches to admitting prior acts of domestic violence.[245] This variance may be due to judges' unfamiliarity with domestic violence dynamics,[246]

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241. *See* Sheft, *supra* note 209, at 71 (recognizing that enactment of Fed. R. Evid. 413 conserves both judicial and prosecutorial resources).

242. *See supra* notes 97–101 and accompanying text.

243. *See supra* notes 100–01 and accompanying text.

244. *See* Raeder, *supra* note 190, at 1494–95.

245. *See* interview with Cathy Shaffer, *supra* note 191; interview with Kristin Chandler and Jim Ferrell, *supra* note 196.

246. *See* Raeder, *supra* note 190, at 1494 (reasoning that judges who do not comprehend domestic violence dynamics view prior beatings as extremely prejudicial and not relevant to current charge).

their concern about being overruled,[247] or their degree of comfort with the prosecutor's experience level.[248] Trends among the lower courts' evidentiary rulings, however, remain almost impossible to track because most evidentiary rulings are not appealable by the prosecution.[249]

Without a specific rule governing admission of past domestic violence, the inconsistency at the trial-court level could easily spread to the appellate courts. For instance, given the abuse-of-discretion standard of review for evidentiary rulings,[250] an appellate court could uphold one trial court's admission and another's suppression of evidence in similar fact scenarios. A specific domestic violence exception could prevent this problem by providing a baseline for determining the probative value of prior bad acts in domestic violence cases. Inconsistency in judicial results, whether at the trial or appellate level, perpetuates the problem of domestic violence by hiding the recurrent nature of abuse[251] and reinforcing a batterer's belief that he can get away with prior assaults.

C. *Admitting Prior Acts of Domestic Violence Will Help Deter Future Abuse*

An evidence rule specifically authorizing admission of prior domestic abuse will help deter future abusive behavior. In order to stop the cycle of domestic violence, batterers must experience negative repercussions as a result of their actions and undergo specialized counseling concerning their violent behavior.[252] The realization by batterers that prior acts of abuse can be used against them in future cases can help provide a needed incentive for batterers to seek treatment. In addition, a rule allowing a victim to testify about her past experiences may encourage more victims to report incidents of domestic violence.[253] Finally, without an evidence rule admitting prior domestic abuse, the "law denies reality . . . and asks

247. *See* interview with Kristin Chandler & Jim Ferrell, *supra* note 196 (explaining that trial court judges are reluctant to allow prior acts into evidence because of tremendous fear of being overturned); telephone interview with Jim Senescu, *supra* note 200.

248. *See* interview with Cathy Shaffer, *supra* note 191 (stating that judges are more likely to admit prior acts of domestic violence if experienced prosecutor is arguing motion).

249. *See* Wash. Rev. Code § 10.10.010 (1998); Raeder, *supra* note 190, at 1494.

250. *See* State v. Powell, 126 Wash. 2d 244, 258, 893 P.2d 615, 624 (1995).

251. *See* Raeder, *supra* note 190, at 1494.

252. *See* Crites & Coker, *supra* note 38, at 12.

253. *Cf.* Baggish & Frey, *supra* note 50, at 57 (describing emotional harm victim suffered due to her credibility being attacked on witness stand).

the jury to do the same."[254] A Washington domestic violence task force found that the law's failure to address domestic violence "directly and appropriately" fosters continued abuse.[255] Washington can correct this failure by authorizing the admissibility of evidence of prior domestic violence against both current and past victims.

VI. CONCLUSION

Every day, countless Washington women are physically abused by their intimate partners, yet this state's judicial system continues to ignore their plight by creating hurdles for prosecutors attempting to convict batterers. The current evidentiary rules enable batterers to avoid conviction or meaningful punishment by silencing current and past victims from testifying about prior abuse. The Supreme Court of Washington should create a new evidence rule to admit evidence of prior domestic violence against either current or past intimate partners for the purposes of showing the defendant's propensity to abuse. Until this happens, batterers—like Roger—will continue to beat their intimate partners without consequence.

254. *Id.* at 59.

255. *Washington Final Report*, *supra* note 21, at 2.